No. 425 and 463 and 464

Brief of Akin, Shepard, Solora & Iles for D. C. & Opp

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

Filed Jan. 20, 1898.

Josephine C. Drake, et al., Executors, etc.,
Plaintiffs in Error,
vs.
Daniel H. Kochersperger, County Treasurer and ex-officio County Collector, Cook County, Illinois,
Defendant in Error.

No. 425.

Error to the Supreme Court of the State of Illinois

Elizabeth Emerson Sawyer, et al., Executors, etc.,
Plaintiffs in Error,
vs.
The Same,
Defendant in Error.

No. 463.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Jessie Norton Torrence Magoun,
Appellant,
vs.
Illinois Trust and Savings Bank, Executor, etc., of Joseph T. Torrence, deceased, and Daniel H. Kochersperger, County Treasurer, etc.,
Appellees.

No. 464.

Appeal from the Circuit Court of the United States for Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEE.

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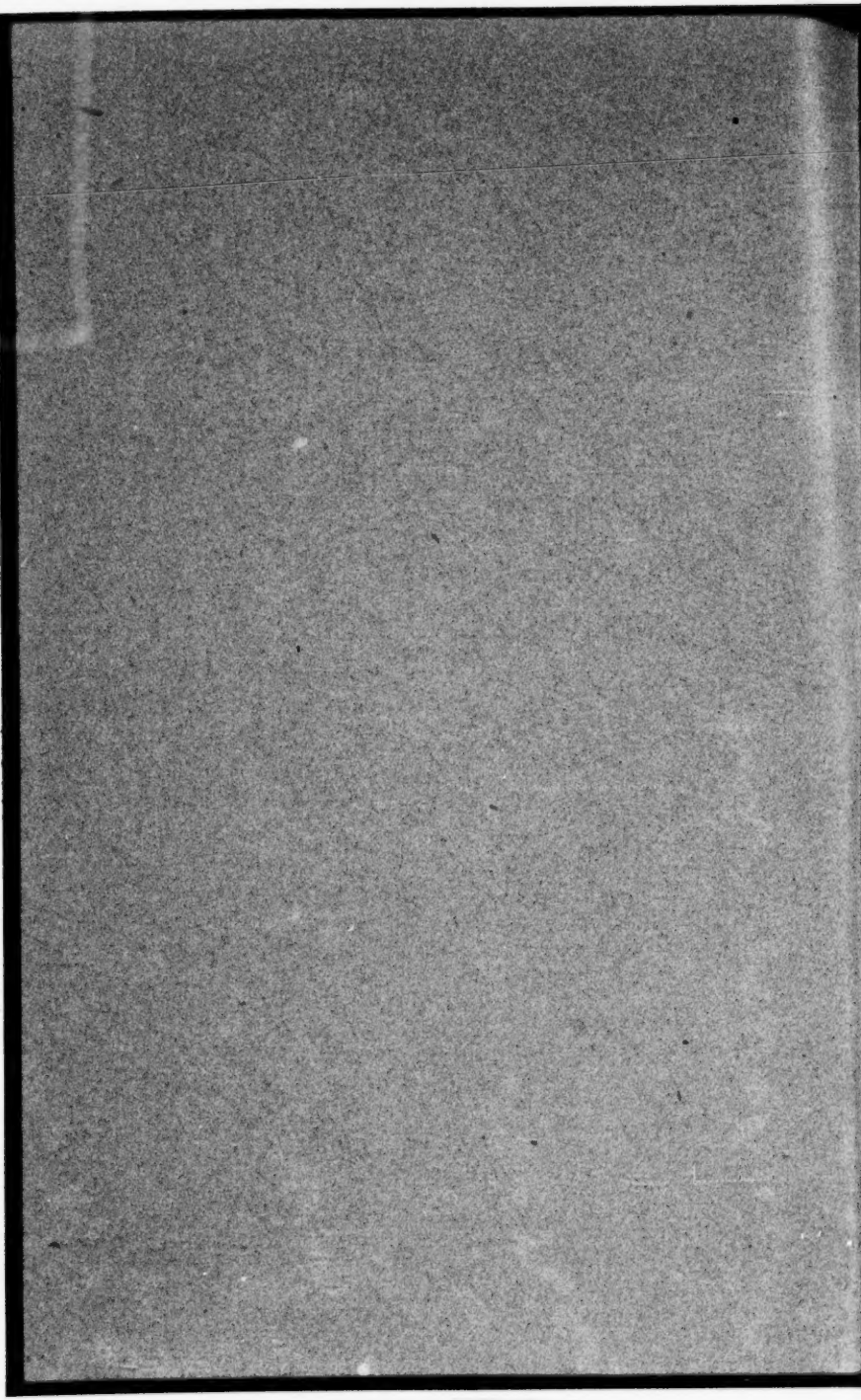

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR AND APPELLEE.

I.

STATEMENT OF ISSUES.

The sole question at issue in the above entitled cases at bar is the question of the constitutionality, under the Con-

stitution of the United States, of an act of the General Assembly of the State of Illinois, providing for and authorizing an excise duty, denominated an inheritance tax, upon the right to receive and the transmission of property by will or the intestate laws of the state, approved June 15, 1895, in force July 1, 1895.

And further, the only portions of said statute involved in this controversy are Secs. 1 and 2 of said act—the remainder of said act being predicated upon the validity of Sec. 1, and merely providing the method and means of enforcing the collection of said excise duty.

The case of *Josephine C. Drake, et al.* v. *Daniel H. Kochersperger, County Treasurer and ex-officio County Collector of Cook County, Illinois*, is an action brought upon petition to the County Court of Cook County to appoint an appraiser under the provisions of said act, and was heard in the Supreme Court of the State of Illinois, upon appeal from the County Court.

The Supreme Court of the state held the act constitutional and remanded the case, with directions to the County Court to appoint an appraiser, and the case comes to this Supreme Court upon writ of error to the Supreme Court of Illinois.

The case of *Elizabeth Emerson Sawyer, et al.* v. *Daniel H. Kochersperger, County Treasurer and ex-officio County Collector of Cook County*, is an action brought in the County Court of Cook County, Illinois, to enforce payment of the duty assessed against the several legatees and devisees under the will of Charles W. Sawyer, deceased, which case was removed to the United States Circuit Court, for the Northern district of Illinois, upon petition of the defendants, and heard therein upon petition and

answer, in which answer the defendants admit all the material allegations of the petition but deny the constitutionality of the act in question, and rely solely upon the question of the constitutionality of the act under the Constitution of the United States.

The court decided the issues in favor of the petitioner, Daniel H. Kochersperger, county treasurer, and entered judgment against the defendants and in favor of the petitioner, as such county treasurer and ex-officio county collector of Cook County, in the sum of $6,970., to be paid by said executors and trustees in due course of administration for the account of the various defendants interested in said estate; and the case comes to this Supreme Court upon writ of error to said Circuit Court of the United States.

The case of *Jessie Norton Torrence Magoun* v. *The Illinois Trust & Savings Bank, as executor, and Daniel H. Kochersperger*, is a suit in equity brought in the Circuit Court of the United States, for the Northern district of Illinois, by the complainant to enjoin the defendant, The Illinois Trust and Savings Bank, as executor of the will of Joseph T. Torrence, deceased, from paying, and the defendant, Daniel H. Kochersperger, county treasurer and ex-officio county collector of Cook County, from collecting or receiving the inheritance tax alleged to be due and collectable from the complainant as devisee or legatee under the will of said Joseph T. Torrence, deceased.

In said bill the complainant relies solely upon the question raised as to the constitutionality of the said statute of the State of Illinois under the Constitution of the United States, and admits that said inheritance tax or

duty is due the State of Illinois from the complainant as such legatee or devisee, if said statute is constitutional under the Constitution of the United States.

The court heard the same upon bill and answer, decided the issues against the complainant and dismissed the bill for want of equity, and the case comes to this Supreme Court upon appeal from the said Circuit Court of the United States.

The assignment of errors in all three cases at bar are in substance identical and present but one issue, *i. e.*, the question of the constitutionality, under the Constitution of the United States, of said statute of Illinois, providing for an excise duty and denominated an inheritance tax.

The plaintiffs in error and appellant concede the power of the State to impose an inheritance tax and to grant reasonable exemptions, and confine their challenge to the constitutionality of the act to the mere question of the right of the state to provide by law for a graduated or progressive inheritance tax or duty upon the right to succeed to the property of a decedent, and to omit from the operation of such law amounts as large as specified in said act. (Plaintiffs' and appellant's brief, 7–8.)

II.

ANALYSIS AND CONSTRUCTION OF THE ILLINOIS LAW IN QUESTION.

The distinctive features of the duty imposed by the act in question are that bequests and inheritances are classified with reference to the relationship of the beneficiary to the decedent, and the amount of the bequest or inheritance devolved.

The classes formed are six in number, as follows:

Class 1. Where the beneficial interest passes to or for the use of a father, mother, husband, wife, child, brother, sister, wife, or widow of a son, or husband of a daughter, or any child or children adopted, or any lineal descendant born in lawful wedlock, the duty is fixed at $1. on every $100. of the clear market value of such property received by each person in excess of $20,000.

Class 2. Where the beneficial interest passes to or for the use of an uncle, aunt, niece, nephew, or any lineal descendant of the same, the duty is to be fixed at $2. on every $100 of. the clear market value of such property received by each such person in excess of $20,000.

Where the beneficial interest passes to or for the use of one who does not sustain any relation to the decedent, as enumerated in the first two classes, the duty is based upon the amount received by each such persons, as follows:

Class 3. Where the amount or estate received is of value of $10,000. or less, the rate is fixed at $3. on each $100.

Class 4. Where the amount or estate received is of value exceeding $10,000. and not exceeding $20,000., the rate is fixed at $4. on each $100.

Class 5. Where the amount of estate received is of value exceeding $20,000., and not exceeding $50,000., the rate is fixed at $5. on each $100.

Class 6. Where the amount or estate received is of value exceeding $50,000. the rate is fixed at $6. on each $100.

NOTE. Where the amount of estate received by one not within the relationship enumerated in the first two classes does not exceed $500. no duty is imposed. No duty is imposed upon life estates or estates for years where such estates pass to or for the use of a father, mother, husband, wife, brother, sister, widow

of a son, or a lineal descendant of the testator, with remainder to a collateral heir or stranger to the blood or a body politic; but for the value received by the remainderman, after the value of the life estate is deducted, the duty is charged at the rate prescribed for the class of beneficiaries to which such remainderman belongs.

The method of computing the rate to be charged in the several classes is immaterial in deciding the issues involved in this case for the classification into six classes is clearly defined by the provisions of the act, and does not depend for its existence upon any ultimate construction that may be placed upon the method required for computing the rate to be charged in either of the classes, to wit:

The classification into six classes remains unchanged whatever method of computation may be used.

It is apparent that the word "estate" as used in the act relates to and indicates the estate or property passing to and received by the heir, legatee or devisee, and not the estate of the deceased; and that in the specification of classes 1, 3, 4, 5 and 6, the word "estate" is equivalent to the words "legacy, devise or inheritance."

By substituting its equivalent for the word "estate" in such classification, all ambiguity disappears, and the intent of the legislature is clear and the provisions in relation to all bequests, not included in the first two classes, read as follows:

"In all other cases the rate shall be as follows:

On each and every hundred dollars of the clear market value of all [such] property and at the same rate for any less amount; on all legacies, devises or inheritances of ten thousand dollars and less [in value], three dollars; on all legacies, devises or inheritances of over ten thousand dollars and not ex-

> ceeding twenty thousand dollars [in value], four dollars; on all legacies, devises or inheritances of over twenty thousand dollars and not exceeding fifty thousand dollars [in value], five dollars; on all legacies, devises or inheritances over fifty thousand dollars [in value], six dollars; provided that a legacy, devise or inheritance in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

And the provision in relation to the omission of property at a less sum than $20,000. from the operation of the law, set out in the specification of Class 1 (Lineals), reads as follows:

> "Provided that any legacy, devise or inheritance which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person."

Such construction and substitution are in strict conformity with well established rules of construction held by the courts, and the court not only may but should substitute a word or words, or such equivalent or synonym, when such substitution makes clear the intent of the legislature, as expressed by the purpose and the language of the act.

Perry County v. *Jefferson County*, 94 Ill., 214, 220;
Walker v. *City of Springfield*, 94 Ill., 364, 371;
The People ex rel v. *Hoffman*, 97 Ill., 234, 237.

The intent of the legislature to levy the duty or tax upon the legacy or inheritance passing from a decedent to the heir, legatee or devisee, and not upon the estate of

the decedent, is manifest from the language of the act as expressed by the charging part of Sec. 1, and also from the title of the act. The object of the legislature is often avowed in the title of the act, as well as in the preamble. (94 Ill., 214-223; Potter's Dwarris Stat., 103.)

It is entitled, "An Act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same."

The charging part of Section 1 provides as follows:

> "All property, real, personal and mixed, which shall pass by will or the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death * * * to any person or persons, or body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be, and is subject to a tax at the rate hereinafter specified."

Stripped of its verbiage, the express provision is that property in the state passing from a decedent to an heir or legatee by will or the intestate laws of the state, or by gift in contemplation of death, shall be subject to a tax, at a rate to be specified in said act.

Again, in section 4 of the act, the tax is made a lien upon specific legacies, and the administrator or executor is forbidden to pay any specific legacy until the tax on such legacy is paid, and if such legacy is money he is required to deduct the tax and pay over the balance, and

if a legacy is a charge upon any real estate, the heir or devisee entitled to the real estate is required to pay the tax upon such legacy and is authorized to deduct the amount so paid from the legacy in his settlement with the legatee, and until such tax is paid it is a lien upon such real estate.

The above expressed provisions are inconsistent with any other theory, except that the duty or tax is rated and charged against the several legacies and inheritances *upon the basis of the value of the estate passing to the legatee or heir*, and not, in any instance, upon the basis of the value of the entire estate of which the deceased died seized. And considered together with the fact that the word "estate" is a word of many meanings and applies as well to the property passing to the legatee or heir as to the property of which the deceased was seized at the time of his death, removes all doubt and determines the sense in which the word "estate" is used in this act.

Statutes should be interpreted according to the intent and meaning, and not always according to the letter.

Potter's Dwarris on Statutes, 144, 175.

Where we manifestly see what is the sense that agrees with the intent, it is not permissible to turn the words to a contrary meaning.

Vattel Book II, Chap. 17, Sec. 274, page 220.

The construction, advanced by counsel for plaintiffs in error and appellant, that two systems of classifications are used, one based upon the amount received by each person, and the other based upon the value of the whole estate owned by the decedent, is manifestly erroneous in

that it violates the above well settled rules of construction and leads to an absurd conclusion.

The absurdity consists in this: that to introduce the two systems of classification contended for by counsel would also introduce two methods of computation in all estates which include legacies or inheritances passing to persons of the first or second class and also to persons not of those classes; one method based upon the amount received by each person and the other based upon the amount of the entire estate left by the decedent.

This conflict of method of computation, in view of the fact that by the terms of the act the duty or tax assessed is chargeable only against the respective shares passing to the several beneficiaries, would make it impossible to collect all the duty required to be assessed on account of legacies or inheritances passing to persons not of the first or second class, except in a limited number of cases, *i. e.*, only in cases where the sum of such legacies or inheritance equal or exceed the amount of tax imposed by reason of the same.

Illustration:

Suppose A died seized of property valued at $1,000,000., and by will devised $750,000. to his children, $200,000. to nephews and nieces, and $50,000. to strangers to the blood.

Then the duty assessed upon the estate in behalf of the bequests to strangers to the blood would be $6. on each $100. of the aggregate estate of $1,000,000., which amounts to $60,000., whereas, the legacies bequeathed are only $50,000., and as there is no provision in the act for the entire estate contributing toward the payment of such duty and no provision for its distribution among other

beneficiaries, it follows that a duty of $10,000. in excess of all the funds available for its payment, would be levied, and that such excess would be uncollectible.

It is therefore evident that the legislature did not intend the word "estate," as used in the specification of classes in the act, to relate to the estate of which the deceased died seized, but intended that it should be interpreted, in conformity with the rest of the act, to relate to the estate passing from the decedent to the beneficiary, in every instance where the word is used with reference to classification; for it will not be presumed that the legislature intended to enact an absurdity.

The construction which we contend for is the one given in other states to similar language in statutes of this nature.

In the matter of Howe, 112 N. Y., 100, the act passed declared that all property which should pass by will to any person, etc., other than the father or certain other excepted persons:

> "shall be subject to a tax of $5. of every $100. of the clear market value of such property, provided that an estate which may be valued at a less sum than $500. shall not be subject to such tax or duty."

It was contended that the word "estate" meant the whole body of the estate, but the court said:

> "We think that applies to the portion of the property passing to the legatee or devisee, and not to the whole estate left by the testatrix. The tax is not imposed upon the estate of which she was seized or possessed, but only upon so much of it as passes to certain persons, not all persons or any person; and, although the executor is required to pay the tax, he is to deduct it from the particular legacy. * * * There are many other provisions of the act requiring the same construction, all tending to show that in

> the matter of taxation, it is simply the estate or share of the beneficiary acquired through the will or the statute of distributions, which is to be valued, and the duty estimated according to its value."

The matter of Hoffman, 143 N. Y., 327, to the same effect.

In California, the statute provided that all property which should pass by will or by the intestate laws of the state from any person who may die to persons other than to the father, mother, husband, etc., shall be subject to a tax of $5. on every $100. of the market value of such property

> "provided that an estate which may be valued at a less sum than $500. shall not be subject to such duty or tax."

In re Wilmerding, 117 Cal., 281, among other objections to the constitutionality of the law, it was contended that the act was invalid:

> "For the reason that it exempts from the tax estates which may be valued at a less sum than $500.";

but the court said:

> "The estates which are thus exempt are not the estates of the decedents which are less than $500. in value, but the estates taken by an inheritance or devise, which, under the provisions of the act, are valued at less than that sum."

Counsel endeavor to defend their construction by quoting from the opinion of the Supreme Court of the State of Illinois in the Drake case, but in this they are equally erroneous in their reasoning. The language quoted is as follows:

> "By this act of the legislature six classes of property are created heretofore absolutely unknown. It is those classes of property depending upon the estate

> owned by one dying possessed thereof of which the state may regulate as to its descent and the right to devise. * * * No person inherits property or can take by devise except by the statute; and the state, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

The interpretation placed by counsel in their argument upon the above quoted language used by the court, is a misapplication of the court's meaning and a perversion of the language.

The clause, "It is those classes of property depending upon the estate owned by one dying possessed thereof of which the state may regulate as to its descent and the right to devise," does not relate to the *method* of classification used, but relates solely to *power* of the state to classify such property and to levy a tax upon the several classes.

The clear meaning of the language quoted is, that the legislature has created six classes of property *out of property over which the legislature has control for that purpose*, and that the property out of which such classes are created, is property *subject to devolution by the statute of wills and the intestate laws of the state*, and it cannot be construed as limiting the system or method of classification used in said act. The language is the statement of a *general principle*, and not the specification of a rule of action to govern the method or extent of a special classification.

The Supreme Court of Illinois, so far from holding in the Drake case that the tax is based in any instance upon the estate of which the deceased died seized, holds clearly to the contrary in the following express terms:

> "The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates,

and, under the provisions of the statute, is to be determined by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited."

And in stating the classification provided in the law, the court says:

> "That statute [The Inheritance Tax Law] provides that certain classes of property which were a part of an estate shall be exempt from taxation under these provisions, and when the legislature provides other classes of property some of which shall pay $1. per $100. and others $2., others $3., and others $4., and still others $5., and again others $6. per $100., six different classes are created under and by which a tax is levied by valuation on the right of succession to a separate class of property. The class on which a tax is thus levied is general, uniform, and pertains to all species of property included within that class."

The illustrations given by counsel (page 10, appellants' brief) are inconsistent with each other; and, with one exception, are at variance with their theory advanced on page 9, "that the tax applying to all legatees or devisees other than near relatives depends upon the amount of the estate left by the decedent irrespective of the amount received."

Hence the illustrations prove nothing except that counsel have forgotten or ignored their major premise.

The second objection of counsel based upon the illustration given (p. 11, appellants' brief) in which it is shown that, if the duty be levied in the several classes of non-relations upon the basis of the amount received by each person, a legatee receiving by will $10,000., would be the recipient of more money after the tax was paid than one who is bequeathed $10,001., is equally untenable in the eye of the law, for the condition assumed is so extremely

improbable as to be presumed to be practically impossible, and for the additional reason that in any event, and in every instance, the rate required to be paid in the several classes is uniform within such classes, and each legatee or devisee pays at the same rate and amount for the same benefit received, and all persons under the same conditions, or placed in the same circumstances, are entitled to the same privileges and charged with the same obligations.

Moreover, it is to be observed that the questions in issue here are the power of the legislature to classify and the constitutionality of the classification under the Federal Constitution, and not the construction of the statute as to the method of computation to be used in finding the amount due in a particular estate.

The question of construction as to the method of computation to be employed in finding the amount to be charged against a particular legacy is quite a different proposition from the question of the power to classify and the validity of the classification when made.

It is a well settled rule of construction that where two constructions may be given to a provision of a statute, one reasonable and consistent with the spirit of the law, and the other unreasonable, inconsistent or absurd, the reasonable and consistent construction should be given, unless the language of the statute forbids such construction.

Potter's Dwarris on Stat., 144;
United States v. *Kirby*, 7 Wall., 486;
Oates v. *First Nat'l. Bank*, 100 U. S. Rep. (10 Otto) 239.

We, therefore, submit that said act, when construed by the well established rules of the construction applicable thereto, is logical in its classification, and uniform in its application to all persons similarly situated, who come within the scope of its provisions, as follows:

1. Six separate and distinct classes of inheritances, legacies or mortuary gifts are created, based upon the relationship of the heir, legatee or devisee to the deceased, and the amount of such inheritance, legacy or mortuary gift devolved.
2. The duty charged is charged upon the legacy, inheritance or mortuary gift passing from a decedent and not upon the estate of the decedent.
3. The rate of duty charged is based upon the amount received by the heir, legatee or devisee with reference to his relationship to the deceased, and is a duty or tax upon his right of succession.
4. The rate charged is uniform within each class, and all persons under the same circumstances or placed in the same condition, are entitled to the same privileges, and are charged with the same liabilities.

We see, therefore, that appellants in order to sustain their contention that this law operates unequally upon persons under like circumstances and conditions are driven to a construction of the law which is strained, unnatural and absurd. It may be, however, that counsel do not mean all that their language implies, and that what they desire to be understood as saying is, that the rate shall be levied on the portion of the estate which passes to strangers, without reference to the amount of such portion passing to each person. In this view, the case presented by the illustration of

appellants might possibly result from the operation of the law. But we submit that even under such a construction, the law should not be held invalid on the ground of inequality. That portion of the law now under discussion relates to the transmission of property to strangers, and it should be borne in mind that such transmission under the laws of Illinois can only be had under and by virtue of some testamentary disposition. Under the intestate laws of Illinois, strangers can under no cirstances take any portion of a decedent's estate. The question now discussed relates, therefore, only to the right of a person to transmit property to strangers, and of such strangers to take property by will.

We will hereafter show that inheritance tax laws have, by the great weight of authority, been held to impose a duty upon privileges, and not a tax on property. But whether such laws impose a duty on the privilege of transmitting or on the privilege of taking is, perhaps, not so clear.

Where property passes under intestate law, no privilege can be said to be granted to or exercised by the decedent. The law in such case distributes the estate, and confers upon certain named persons the right to take the property. Here, the privilege must necessarily be a right to take and the duty, if any, is imposed, is upon that right. Where property passes by will, and the law imposes a duty upon the estate passing to each legatee or devisee, and each legatee and devisee is charged with the payment of the duty, in such cases, the law seems to be leveled at the right to take, and the duty, in such cases, may, we think, be justly said to be a tax upon the right of succession. But where the law gives no heed to the manner of dsstribution, or to the individual devisees or

legatees, and the personal representatives are charged with the payment of the duty out of estate of the decedent, there, it seems to us, the law is leveled at the right to transmit; it is the decedent who is in the mind of the legislature, and the duty imposed is upon the right of a decedent to transmit his property by will.

If the construction contended for by appellants is the true one, then we submit this law, so far as it relates to strangers, imposes a duty upon the privilege of transmitting property to that class of persons rather than upon the privilege of such persons to succeed to a decedent's estate, and, had the Supreme Court of Illinois adopted appellants' construction in the Drake case, it would have so held.

The distinction, for which we contend, is not without authority to support it.

In the case of *State* v. *Hamlin*, 86 Me., 495, the Supreme Court of that state says:

> "It is argued that the excise, if upon privilege of taking property by will or descent, should be the same whenever the privilege enjoyed is the same in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. But the right or privilege tax can perhaps be regarded either as the right or privilege of the owner of the property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property. The tax, too, has some of the characteristics of a duty on the administration of estates. * * *"

If the law in question, so far as it relates to strangers, is held to impose a duty upon the right to transmit property to strangers by last will and testament, then it is

without objection on the ground of non-uniformity or inequality. Under such construction, the law says to all persons, without distinction, discrimination or classification, you may dispose of your property to strangers, by will, upon the following terms and conditions:

If you devise or bequeath property amounting to $10,000. or less, the duty shall be 3 per cent; exceeding $10,000. and not exceeding $20,000., 4 per cent; exceeding $20,000. and not exceeding $50,000., 5 per cent; exceeding $50,000., 6 per cent. If the amount of property so transmitted does not exceed $500. in value no tax shall be imposed. Such a law confers upon each and every person a like privilege, and imposes upon each and every person a like duty or tax.

But counsel for appellants contend that under this construction it may happen that two persons who are each left a legacy of like amount, but from different estates, may not realize the same amount from their respective legacies. This is true, but such a result is not aimed at or contemplated by the law. It is an inequality resulting from a possible operation of the law, and this in no wise affects its constitutionality.

In speaking of the validity of laws by reason of inequality of burden resulting from their operation, this court, in the case of *Merchants Bank* v. *Penn.*, 167 U. S., 467, quoting the language of the lower court, says:

> "The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand."

And this court then adds:

> "Indeed, this whole argument of a right under

the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232, 237, in which case Mr. Justice BRADLEY, speaking for the court, said:

'The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products: it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. * * * We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt.' See, also, *Jennings* v. *Coal Ridge Improvement Co.*, 147 U. S., 147."

III.

There is no Natural Right of Inheritance or Succession, and the State has the Absolute Right of Control over the property of Decedents.

Counsel for appellant advance the contention that there is a natural right of succession or inheritance. They insist that:

> "The estate of a decedent is to go to some person or persons. To what persons and in what proportions the state may determine and regulate, and that is the extent and limit of its power,"

and they quote a sentence from the opinion of Mr. Justice BROWN in *U. S.* v. *Perkins*, 163 U. S., 628, as recognizing this natural right. Said sentence is as follows:

> "The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents."

The sense in which the term "natural right" was used in the above sentence is clearly shown by the opinion from which the sentence is taken. We shall have occasion to quote said opinion in another connection. Natural rights are such only as pertain to man in his natural condition. Speaking of natural rights, BLACK, in his Constitutional Law, page 386, says:

> "It was formerly the custom to use this term as designating certain rights which were supposed to belong to man by the 'law of nature,' or 'in a state of nature.' But clearer modern thought has shown that the 'state of nature' assumed by the older writers is historically unverifiable and inadequate to account for the origin of

> rights. * * * The law of physical nature recognizes no equality of rights, its rule is the survival of the fittest. In a state of nature, such as was once supposed, there could be no right but might, no liberty but the superiority of force and cunning. * * * But since organized society is the natural state of man, and not an accident, it follows that natural rights must be taken under the protection of law, and although they owe to the law neither their existence nor their sacredness, yet they are effective only when recognized and sanctioned by law."

The right to inherit property cannot be regarded as a natural right. It doesn't exist at all except as it is created by positive law, and it is always subject to change by the same law.

COOLEY in his Constitutional Limitations, p. 439, speaking of rights protected by the law of the land, says:

> "And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living, *and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents.* But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts, and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the de-

ceased in preference to all others. *It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the constitution*"

In *Norman* v. *Heist*, 5 W. & S., 171, the question arose upon an act passed by the legislature to vest in certain grandchildren property that had before the passage of the act vested in the brothers of the intestate. Chief Justice GIBSON, in indignantly denouncing the act, says:

> "This estate was lawfully vested in the plaintiffs, who were the next heirs to their intestate sister, at her death * * * it was theirs in full property * * * it was guaranteed to them by the constitution and the laws * * * and to have despoiled them of it *in favor of the supposed natural right of the grandchildren*, would have been as much an act of despotic power, as it would had the grandchildren been strangers to the intestate's blood. Take it that they had the same claim, on the score of birthright, which their father might be supposed to have had; *yet still, as title is the creature of civil regulation, even a legitimate child has no natural right of succession to the property of its parent.*"

Blackstone's definition of an heir is:

> "An heir, therefore, is he upon whom the law casts the estate immediately upon the death of the ancestor;"

and he says:

> "We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi merely.*"
>
> 2 Blackstone's Com., 211.

In *Lavery* v. *Egan*, 143 Mass., 392, it is said:

> "It is the law, whether customary or statutory, which determines who shall inherit real property when the owner dies intestate, and the law alone decides whether the word 'heirs' shall include rela-

tives or connections by affinity as well as relatives by consanguinity. An heir, therefore, is he upon whom the law casts an estate of inheritance immediately on the death of the owner."

An expectation or probability that the property of a parent will descend to the child, however well founded such expectation may be in the laws of natural affection, is not a right and is not within the protection of the law in the sense that the legislature cannot, by an enactment, entirely obliterate such expectation. The right to life is a natural right, and a vested right; so the right to liberty; so the right to property where the title is vested. It is only vested rights that are protected by the constitution from destruction by the legislature.

In *State Bank of Ohio* v. *Knoop*, 16 Howard, on page 408, Mr. Justice CAMPBELL makes this clear statement:

"The whole society is under the dominion of law, and acts which seem independent of its authority, rest upon its toleration. The multifarious interests of a civilized state must be continually subject to the legislative control. General regulations, affecting the public order, or extending to the administrative arrangement of the state, must overrule individual hopes and calculations, though they may have originated in its legislation. It is only when rights have vested under laws that the citizen can claim a protection to them as property. Rights do not vest until all the conditions of the law have been fulfilled with exactitude during its continuance, or a direct engagement has been made, limiting legislative power over and producing an obligation."

In *Brettun* v. *Fox*, 100 Mass. 234, the court said:

"The objection of the respondent that the statute could not constitutionally limit the owner's power of testamentary disposition is equally novel and unfounded. The power to dispose of property by will is neither a natural nor a constitutional right, but

depends wholly upon statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the legislature."

And in *Mager* v. *Grima*, 8 Howard, 490, this court said of the Statute of Louisiana:

> "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

In *Crane* v. *Reeder*, 21 Mich., 73, it is said:

> "There is no such thing as a natural line of inheritance independent of the law."

And in *State* v. *Hamlin*, 86 Me., 495:

> "Descent is a creature of statute, and not a natural right."

In *Willis* v. *Weller*, 10 Ohio, 464, the court states:

> "In the United States, it is believed that this power (of devising) will be found only as the result of legislation."

In *Eyre* v. *Jacob*, 14 Gratt., 422, it is said:

> "The right to take property by devise or descent is the creature of the law and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent, to a particular class of his kindred, say to his lineal ascendants. It might impose terms and conditions upon which collateral relations may be permitted to take it, or it may, tomorrow if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party, his property shall be applied to the payment of his debts and the residue appropriated to public uses."

And in *Sturgis and others* v. *Ewing*, in the 18th Ill., 176, Mr. Justice CATON said, on page 183:

"And can there be a doubt that the right to devise is a subject entirely within the control of the legislature? The power to devise is not an inherent, natural right, conferred upon us by the law of nature, as is the right to acquire and own. So long as we cannot possess, control or enjoy anything we have, after we are dead, we can have no absolute right to say what shall be done with our acquisitions after that period. As mortals we then cease to be, and all connection with earth and our acquisitions terminate. * * * Depending alone upon the law of nature, our estates would become the property of the first who should seize them as they fall from our hands. The power to control the disposition of our possessions after our demise, is conferred by municipal laws, and is purely a subject of municipal regulation. It is not a part of the right of property itself, but is only an incident to it, as the law for the time being, makes it so. Without this power, our title may be complete and absolute. By devising our property we do not lessen or impair, in the least degree, our title to the property devised. We may change the devise, or alienate it, at pleasure, at any time during our lives; and until our demise, the devisee acquires no sort of right or title to it. When we acquire property, we do not acquire with it, and as a part of it, the right to devise it in any particular mode, or even to devise it at all. The objection urged to this law involves this proposition: that whoever acquires property, acquires with it the right to devise it according to the law as it then exists."

And again, considering the right of heirs to take, he says, on page 185:

"Our statute of descents has provided for the disposition of estates in case of intestacy, and practically performs the office of the will of the deceased. While the legislature gives us the power to dispose of our estates it has provided the law of descents to dispose of them for us, in case we neglect to do so by our wills. This law, as it now stands, provides

that all my children shall share equally in my estate, if I die intestate; and yet my children have no vested right in that provision of law, so as to prevent the legislature from changing the law as that my sons shall take twice as much as my daughters, or that my widow shall take one-half of my estate, or, indeed, make any other disposition of my estate which to them may seem good. While I live, no legal right whatever is vested in my heirs. They have but an expectancy, which may be disappointed by a change in the law at any time, and such change will control the disposition of such portions of the estate which are acquired before the change, as well as that acquired after. * * * A man cannot even have a vested right in his own will, as such, so that the legislature may not so change the law as to make his will, which is now made with all the forms of law, and every disposition in it in strict conformity to the statute, utterly void. * * * A will has no legal effect or power while the testator lives. Till his death it is as nothing. It can deprive him of nothing, and can confer nothing upon another, consequently there can be no vested rights under it which can be violated by any change of the law. * * * Laws regulating the descent of lands are much older than those which confer the capacity to devise them, and yet I am not advised that it has ever been denied that the legislature has power to change the course of descent, and that such change will operate instantly upon all estates which may subsequently descend, no matter when or how the intestate may have acquired the title."

And in *Edwards* v. *Pope*, 3 Scam. R., 465, it is said:

"The legislature may so change the law of descents as to cut off all our expectations of inheritance and confer it upon a single child, and may deny the power of disposition by will as to prevent the bounty of our parents."

To the same general effect is

Henson v. *Moore, et al.*, 104 Ill., 403.

It was then in perfect accordance with the principle enunciated by all the leading elementary writers and by the long line of decisions of the courts of many of the states, as well as of this court, that the Supreme Court of Illinois, in the case now under consideration, declared, as the premise from which it concluded that the state had a right to impose conditions or burdens on the right of succession to the ownership of property, quoting from the opinion of Chief Justice PHILLIPS, in *Drake* v. *Kochersperger*, 167 Ill., 125, that:

> "The existence of the common law within the State of Illinois results from the provisions of Chapter 28 of the Revised Statutes, which declare that the common law of England, and all statutes of a general nature, made prior to the fourth year of James I, shall be the rule of decision and shall be considered as of full force until repealed by legislative authority. By that authority, Chapter 39 of Revised Statutes, entitled "An Act in regard to the descent of property," and chapter 148 entitled "An Act in regard to wills" were enacted which in effect repealed the common law in reference to inheritance, and also repealed the statute enacted prior to the fourth year of James I, in reference to devises. There is not in force in this state, under chapter 28 any law providing for the descent or devise of property. The laws of descent and the right to devise and take under a will, within the State of Illinois owe their existence to the statute law of the state. The right to inherit and the right to devise being dependent upon legislative acts, there is nothing in the constitution of this state which prohibits a change of the law with reference to those subjects, at the discretion of the law-making power."

It is nowhere denied that the right to authorize the disposition of property by a will or testament and to regulate or prohibit it is as much within the control of the state as is the designation of who shall be an heir to in-

testate property. What principle of constitutional law prohibits the state from declaring that the property of a testator shall not pass either by his will or to any person or class of persons by descent? What would be the result of such a statute? Simply, that under the well settled principles of law, real property on the death of the owner would escheat to the state. The conditions under which property shall escheat may be narrowed or enlarged by the legislature of the state. If the state declares that an intestate owner shall have no heirs who may take such property, then the condition is produced under which an escheat must follow. Learned counsel appear to assert that there is some restraining principle which would control such action by the state, but they have studiously refrained from indicating where such principle can be found or by what authority it is established. The right of the state to take where there are no competent heirs is well founded. Title by escheat was originally an incident of feudel tenures, by which, for failure of heirs or corruption of blood, by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure. In this country, dying intestate without heirs is the only ground of escheat, and in Washburn on Real Property, p. 443, it is said:

> "Considered in this light, escheat of lands may be regarded as merely falling back into the common ownership of the state, from which they were theoretically originally derived, because the tenant did not see fit to dispose of them in his life-time, and left no one who, *in the eye of the law*, has any claim to inherit them."

And in *Wallace* v. *Harmstad*, 44 Pa. St., on p. 501, it s said:

> "Escheat, with us, depends on positive statute, which makes the state the heir of the property on

defect of known kindred of the decedent. Nothing about it but the name is feudal."

In *Hughes* v. *The State*, 41 Tex., p. 17, it is said:

"And, as under the general doctrine of tenures in the American States, the state occupies the place of the feudal lord by virtue of its sovereignty, it is universally asserted that, when the title to land fails for lack of heirs or devisees, who may lawfully take, it reverts or escheats to the state as property to which it is entitled";

and Chancellor KENT, 4th Com., 471, says:

"It is a general principle in the American law, and which, I presume, is everywhere declared and asserted, that when the title to land fails from defect of the heirs or devisees, it necessarily reverts or escheats to the people, as forming part of the common stock to which the whole community is entitled. Whenever the owner dies intestate, without leaving any inheritable blood, or if the relations whom he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the state by operation of law";

and on page 472, he says:

"That property should, in such cases, vest in the public, and be at the disposal of the government, is the universal law of civilized society."

This rule with reference to the state succeeding in the absence of persons who may lawfully take, applies as well to personalty as it does to realty. Blackstone in discussing title by occupancy, book 2, page 401, says:

"And, first, a property in goods and chattels may be acquired by occupancy; which, we have more than once remarked, was the original and only primitive method of acquiring any property at all, but which has since been restrained and abridged by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments,

legacies and administrations, have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative;"

And on page 402:

"Thus again, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and, as such, are returned into the common stock and mass of things."

In the chapter on title by testament and administration, second Blackstone, he shows on page 493, that the old common law of England is abolished and:

"A man may devise the whole of his chattels as freely as he formerly could his third part or moiety."

And on page 494:

"In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was and is said to die intestate, and in such cases, it is said that by the old law the king was entitled to seize upon his goods as the *parens patria*, and general trustee of the kingdom * * * the goods, therefore, of intestates were given to the ordinary by the crown, and he might seize them and keep them without wasting and also might give, alien or sell them at his will, and dispose of the money in *pios usus*.

Hence the statutes in the different states which provide for the settlement of estates by public administrators, direct the sale of personalty, and the payment of such debts as may be proved and the payment into the state or county treasury of the residue arising from the sale of such chattel property to be held for the use and purposes

of the state, where no person lawfully entitled to receive the same under the laws of the state makes any claim to it.

The state then by virtue of its sovereignty, having the absolute right to declare who shall be competent to inherit, may declare that no individual shall be competent to inherit and such declaration would neither be "spoliation" or "confiscation" nor a "bill of attainder" as is declared in fervid terms of counsel. To suggest that such legislation would be unwise or unusual merely goes to the policy of such legislation, but not to the power of the state to enact it.

It is true, as counsel concede, that in the cases now before the court it is not necessary to decide whether the legislature of any state can destroy the right of inheritance or devise and bequest. The state here has not attempted to do so. To vindicate the power of the state in that regard should not be necessary in this case because regulation of succession and inheritance is all that the statute under consideration attempts. Our excuse for entering upon the discussion is found in the fact that counsel, notwithstanding the above quoted admission, sound in the prelude of their argument, and carry throughout their brief, as the dominating, though frequently discordant note of their contention, the denial of the absolute power of the state to control the transmission of a decedent's property.

IV.

THE STATE MAY EXACT A SUM OF MONEY AS A CONDITION OF PERMITTING THE INHERITANCE OF PROPERTY AND SUCH EXACTION IS NOT A PROPERTY TAX.

From the fact already demonstrated that inheritance of or succession to the property of a decedent is a privilege granted by the free grace of the state, it results:

A. That the state may rightfully in the exercise of legislative discretion impose conditions upon which the privilege is to be enjoyed; and,

B. That where the state reserves to itself a sum of money which it exacts as a condition of inheritance or succession it is not a tax upon property in the legal sense of the term, but is rather an excise or duty imposed on the privilege.

A. The state may attach conditions to privilege granted.

In *Eyre* v. *Jacob*, 14 Grat., 427, the court said:

> "Possessing this sweeping power over the whole subject, it is difficult to say upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as a condition upon which those who take the estate shall be permitted to enjoy it can be successfully questioned. That the tax is confined to collateral inheritances and devises and devises to others than those specified presents no difficulty; it is the will of the legislature to make this discrimination and its discretion upon the subject must be regarded as having been duly and properly exercised."

In *Mager* v. *Grima, et al.*, 8 How., 490, this court, speaking by Mr. Chief Justice TANEY, said:

> "And if a state may deny the privilege altogether

it follows that when it grants it it may annex to the grant any conditions which it supposes to be required by its interests or its policy."

In *United States* v. *Perkins*, 163 U. S., 625, Mr. Justice BROWN, speaking for the court, said:

"Similar restrictions upon the power of disposition by will are found in the codes of other continental countries as well as in the State of Louisiana, though the general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents, we know of no legal right to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good. * * * Certainly if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect."

And the learned justice quotes with approval from *State* v. *Dalrymple*, 70 Md., as follows:

"Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing the property to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions not in conflict with or forbidden by organic law as the legislature may deem expedient. These conditions, subject to the limitation named, are consequently wholly within the discretion of the General Assembly."

B. The sum exacted by the state for the excise of the privilege is not a property tax.

In *Erye* v. *Jacob*, *supra*, it is said:

"If the tax imposed had been a fixed and arbitrary sum, it would scarcely have been said to be a tax on property, although every tax for which the property of the taxpayer is liable might be called a tax on

property in a certain sense, but the argument is that as the tax is a certain per centum of the value of the estate and the property pays it, it is therefore a tax on the property itself. But this is by no means a necessary logical conclusion. The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain per centum upon the value of the whole estate transmitted."

In *State* v. *Hamlin*, 86 Me., 495, where the whole subject of the nature of this kind of impost is intelligently considered and discussed, it is said:

"The tax provided for in the statute under consideration is clearly an excise tax. The whole tenor and scope of the act is one of excise and not a tax upon property as that term is used in the constitution. It is not laid according to any rule of proportion, but is laid upon the interest specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the state liable to be assessed for public purposes. * * * Substance and not form or phrase is the important thing. All exactions of money by the government are taxes, but they are not all levied by assessment upon value. The latter class refers to the burdens recurring periodically, which are assessed upon valuations of property made at stated intervals. * * * The tax under this statute is once for all an excise or duty upon the right or privilege of taking property by will or descent under the law of the state * * * it is not levied as property taxes usually are. There is no given sum to be assessed in which the percentage is fixed by valuation, but the percentage is fixed by law, leaving the amount to be ascertained by

valuation. The value of the property is resorted to to measure the amount of the excise."

And in *Minot* v. *Winthrop*, 162 Mass., 133, it is said:

"Taxes on legacies and inheritances or on successions in any form to property on the death of the owner have generally been considered not as taxes upon property, but as excises upon the privilege of taking or transmitting property in this way."

In *Wallace* v. *Myers*, 38 Fed. Rep., 184, speaking of tax on legacies and successions imposed by the act of Congress of June 30, 1864, the court said:

"The subject-matter of the assessment under that act was held by the Supreme Court in *Scholey* v. *Rew*, 23 Wall, 231, to be the devolution of estates or the right to become beneficially entitled to it and the act was considered as taxing a privilege and not property * * * The precise question now presented was considered by the Supreme Court of Pennsylvania in *Strode* v. *Commonwealth*, 52 Penn. St., 181, and the court treated the statute not as taxing property but as a regulation of the transmission of the property of decedents and upon that view held that government securities were properly included in the valuation of the inheritance upon which the tax was assessed."

In *Scholey* v. *Rew*, *supra*, Mr. Justice CLIFFORD, speaking for the court said of the succession tax imposed by the statute then under consideration:

"But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those provisions; instead of that it is plainly an excise tax or duty authorized by section 8 of article I which vests the power in Congress to lay and collect taxes, duties, imposts and excises to pay the public debts and provide for the common defense and general welfare."

And in *United States* v. *Perkins*, *supra*, this court said:

"That the tax is not a tax upon the property itself, but upon its transmission by will or descent is also held, both in New York and in several other states * * *. We think, therefore, that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax and it is only upon this condition that the legislature assents to a bequest of it."

V.

The Legislative Discretion as to the Classification of Persons Who May Inherit, and the Enumeration of Classes that Shall Pay the Excise, and Those Who Shall be Exempt From it, Must in its Very Nature be Free From External Control or Judicial Review.

Learned counsel for plaintiffs in error have frequently denounced the act of the legislature in question as arbitrary. The word "arbitrary" has different meanings—one,

> "not regulated by fixed rules or law, determinable as occasion arises, subject to will or judgment; discretionary";

another:

> "Despotic; tyrannic."

Discretion is a power or right conferred by law of acting officially in certain circumstances according to one's own judgment or conscience, uncontrolled by the judg-

ment or conscience of others. In legislation, the deliberate, cautious judgment of the law making power.
Anderson's Law Dictionary.

Whenever discretion is committed to the legislature, it is to be exercised uncontrolled by the judgment or conscience of other departments of the government. Such discretion is not arbitrary in the sense of being despotic, as learned counsel in their use of the word seem to imply. The legislature has discretion to classify successions and inheritances. The privilege of succeeding to, or inheriting property is granted by the free grace of the legislature to whatever persons or classes of persons are designated to enjoy it. No person or class, as we have already seen, has any natural or original right to such a privilege. Counsel admit the right of the legislature to distinguish between lineals and collaterals, and to impose a burden upon the one class that is not imposed upon the other. The right to classify being admitted, it must follow that the legislature is free to impose the heavier burden on whichever class it sees fit—that is, there is no rule which could prevent the legislature from taxing successions to lineals at a higher rate than those to collaterals. Could a statute so disposing the tax be declared arbitrary and held void by a court as denying to the lineals the equal protection of the laws? Counsel contend that the legislature has no power to discriminate by classifying successions as to amonnts, and imposing a higher rate of tax on one amount than on another, but they admit, what is fully established by the authorities, that the legislature may fix an amount and determine that inheritances, successions or estates, which fall below such amount in value, may be transmitted without the imposition of the

tax, while the tax is imposed upon those which exceed in value the stated amount. In fixing such amount, it is very clear that the legislature exercises an official discretion that is not subject to any external control. No rule can be pointed out which limits the legislature in fixing an amount, and in declaring that estates below that amount shall be exempt from succession tax and duties; neither can any rule be prescribed or laid down that will control the discretion of the legislature in enumerating the classes that shall be exempt from succession or inheritance tax.

In New York, one class of persons has been exempted from the tax, and estates or legacies or successions not to exceed $500. in value; in Pennsylvania, a different class is exempt, and the amount exempted is fixed at $250.; in Maryland, estates not to exceed $500. are exempted; in West Virginia, $1,000. is the amount; in Connecticut, $1,000.; California, $500.; in Massachusetts, not exceeding $10,000.; and the United States Succession Tax Law, passed in 1862, exempted property passing to husband or wife, and also estates not exceeding $1,000. in value; and finally, in Illinois, by the law under consideration, estates of $20,000. passing to a certain class, in the law designated, are exempt from the tax.

(For a complete statement of exemptions in the different states, see Dos Passos, pp. 77 to 92.)

By what rule did the legislatures of these different states arrive at the respective amounts which they have elected to exempt from the burden of the tax, and what test can be applied to determine the correctness and reasonableness of any of these exemptions, and to con-

demn any of the others? Is it not manifest that the amount which shall divide inheritances to be taxed from those which shall be free must be fixed at some definite figure arrived at by the legislature in the exercise of legislative wisdom and discretion, and without the restriction of any directing or controlling rule whatever.

When the right of the legislature to fix in its discretion a limit in amount above which taxes shall be imposed, and below which inheritances shall be untaxed, is admitted the contention against graduated or progressive taxation is abandoned. Suppose the legislature to provide that legacies not exceeding $1,000. shall be exempt; legacies above $1,000. and not exceeding $2,000. shall pay three per cent, legacies above $2,000., and not exceeding $3,000. shall pay six per cent; that legacies or successions exceeding $3,000. and not above $4,000. shall pay nine per cent; does not the concession to the legislature of the right to exempt $1,000., and subject legacies in excess thereof to a tax, determine the right of the legislature to impose upon legacies of $2,000. a different rate of taxation from those below that amount? The difference between no tax and three per cent. is not greater than the difference between three per cent. and six per cent., or between six per cent. and nine per cent. The argument is ended when, at the inception of the discussion, the right to exempt one and tax another is conceded.

It is a great mistake to suppose that rights and privileges granted by the legislature cannot be graduated and determined by the amount of money involved. Take the jurisdiction of courts for

example. Surely the equal protection of the law is due to the citizens in the assertion of their rights in court, and in prosecuting or defending actions or suits; yet one is denied access to the United States Court, while another is admitted to sue therein, though the question of fact and and of law involved in the claims of each may be identical, and the distinction which debars the one and admits the other is the amount in controversy. The amount which distinguishes between the privilege of these two citizens is fixed by Congress, and is the exercise of an uncontrolled, and what counsel call, an arbitary discretion.

So the privilege of appeal is one of great value. It might well be contended that it should be enjoyed by all suitors alike, yet it is almost the universal practice of the legislatures of the different states to allow or deny the privilege of review on the distinction of the amount involved, and that amount is one determined by the uncontrolled and indisputable discretion of the legislature. There is no natural right of appeal. It is a privilege granted by the statute, and, upon the granting of which, the legislature has a right to impose such conditions as it sees fit.

There is also a distinction between grand and petit larceny. Two persons, the moral qualities of whose offenses are identical, are differently punished—the one branded as a felon and incarcerated in the penitentiary; the other subjected to a light fine, or a brief imprisonment in the local jail, upon a distinction which is arbitrary as to the amount in value of the property stolen. Do the legislatures in declaring the amounts—and it is different in different states—which is the only distinction which varies the burden of punishment, deny to the culprits the equal protection of the law? If not, then when the state grants to different classes of persons the right of

succession or inheritance, and imposes upon one class a burden, from which another is relieved, there is no denial to its citizens of the equal protection of the laws. This court has said, in answer to the contention that a state denied the equal protection of the laws and, therefore, violated the Eourteenth Amendment by forbidding some of its citizens access to a tribunal which others of them enjoyed:

> "It (the Fourteenth Amendment) "contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which said regulations are made. * * * It is the right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person its equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction as to the equal protection of the law is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress."
>
> *Missouri* v. *Lewis*, 101 U. S., 22.

Another illustration of the right of the state to impose burdens, graduated with reference to arbitrary amounts upon the privileges which it grants, and one most aptly n point, is found in the laws of the different states pre-

scribing the fees or impost to be paid for the privilege of being a corporation.

The franchise to be a corporation is granted by the state. Upon one corporation taking power to carry on a certain business, with a capital stock of $10,000., one fee or tax is imposed, and upon another taking precisely the same powers, but having a capital stock of twenty or one hundred thousand dollars, a different one, and in both cases, the fee or amount exacted is arbitrarily fixed, and with no reference to a proportion between the rate and amount of capital. Probably in no state in the Union is the fee or tax imposed on the privilege of assuming corporate powers, fixed proportionately on the amount of capital stock, or upon any other measure of the value of the franchise granted. The granting of corporate charters has become in recent years a source of great revenue in some states, and the rates or charges for incorporation are fixed in many states with the manifest purpose of raising revenue. What is the essential distinction between classifying corporations according to the amount of their capital, and taxing the corporate privilege at one rate for one capital, and at a higher or lower rate for a different amount of capital, and classifying the privilege of succession by amounts and taxing those of different amounts at different rates?

This court has in many cases laid down the rule that corporate privilege may be granted, and corporations taxed on any conditions or theories which the state may prescribe.

In *Home Insurance Co.* v. *New York*, 134 U. S., 594, it was determined that the validity of a state tax on corporations created under its laws or doing business within

its territory, can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount which it will exact for the franchise. The statute in question there imposed a tax upon the corporate franchise or business of the company, and reference was made to the capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

Mr. Justice FIELD, who delivered the opinion of the court, said:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which

it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. * * * Its action in this matter is not the subject of judicial inquiry in a Federal tribunal."

And the learned justice quotes for the sake of reiterating, the following language from *Deleware R. R. Tax Case*, 18 Wall., 296:

"The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

And he interprets the case of *California* v. *Pacific Railroad Co.*, 127 U. S., 1, as declaring:

"that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the state; it cannot be furnished by the Federal tribunals."

In *Monroe Savings Bank* v. *City of Rochester*, 37 N. Y., 365, quoted approvingly, by Mr. Justice Field, the court held that the powers and privileges which consti-

tute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the legislature saw fit to so enact; that such taxation being within the power of the legislature, it might prescribe a rule or test of their value.

In the opinion it was said:

> "It must be regarded as a sound doctrine to hold that the state, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the state. If the grantee accepts the boon, it must bear the burden."

The Inheritance Tax Law of Illinois is not only right in principle, but by comparison with the laws of other states it will be found to be more liberal in its exemptions with respect to amounts, and moderate in its exactions than any inheritance tax law in the United States. (See appendix.) And in view of this fact we submit that the allusions of counsel to "arbitrary or spoliative legislation," "bills of attainder," "the passion or caprice of a majority," "confiscation of property" and other like expressions are without force or application and tend to excite prejudice rather than to aid the court in its efforts to administer the law.

VI.

THE DISTINCTION BETWEEN TAXES ON PROPERTY AND EXCISES, IMPOSTS OR TAXES OF PRIVILEGES IS WELL DEFINED.

Whenever the state courts or this court have been called on to discuss the right of the state to impose an impost or duty upon the grant of a privilege or a franchise, the language of the court with reference to the discretion of the legislature is very different in tone and in sense, from that used where the matter under consideration is the levying of taxes upon property which is owned or held by individuals or corporations. So in the *State* v. *Hamlin*, 86 Me., on page 505, the court, in speaking of the principle of uniformity, say:

> "It is necessary to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same class. But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent. * * * An excise tax upon the value of the property so allowed to be received by the collateral or stranger to the blood, leaves him in much better condition than an absolute withdrawal of the privilege would. He cannot complain of unjust taxation, when the state allows him to take a property subject to a duty of two and one-half per cent., when the state has the right to exclude him from the whole."

In *Tyson, et al.* v. *State*, 28th Md., 580, the contention against the law, was that the legislature could impose no tax which was not equally apportioned, on every other species of property within the state, in proportion to its value. The law imposed a tax upon collateral inheritances only. The court said that the constitution provided that:

> "Paupers are exempted from assessment; and all other persons are required to pay their proportion of public taxes, according to the value of their property. Arbitrary taxes on property without regard to value, are expressly prohibited, and all measures for the collection and imposition of taxes upon *property*, are required to conform to this general principle of equality. Whilst thus providing for a *uniform* mode of taxation on property, it was not the purpose of the framers of the constitution to prohibit any other *species of taxation*, but to leave the legislature the power to impose *such other* taxes as the necessities of the government might require."

The italicized words in the above quotation, appear in the opinion of the court as published, and clearly were emphasized to mark the distinction between the requirement of uniformity as to taxes upon property, and other forms of tax, and as indicating that the legislature was not limited by that rule, when imposing a duty upon the privilege of inheritance.

And in *Eyre* v. *Jacob*, 14 Grattan, 422, in answer to the suggestion that the tax was not equal and uniform, the court say:

> "It has been held in several of the states, that the terms 'equal and uniform,' apply only to a direct tax on property, and that the clause by which such equality and uniformity is prescribed does not limit the power of the legislature as to the objects of taxation but is only intended to prevent an arbitrary taxation of property according to kind and quality without regard to value. Hence specific taxes have been sustained as a valid exercise of the legislative power."

So in *Minot* v. *Winthrop*, 162 Mass., on page 122, the court, in sustaining the constitutionality of the tax, held that it did not come under the rule of direct taxation upon property, but under the other condition expressed in the

constitution, that duties and excise must be reasonable, and the court quotes from a prior case as follows:

> "The power to determine what callings, franchises or privileges, or, to use the language of the constitution, 'commodities,' shall be subjected to an excise, and the amount of such excise belongs exclusively to the legislature. The provision that it must be 'reasonable' was not designed to give to the judicial department the right to revise the decisions of the legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the legislature in determining, not only what 'commodity' shall be subject to excise, but also *the amount of the excise and the standard or measure to be adopted as the foundation of the proposed excise.* The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right."

And to the objection that the exemption of $10,000. rendered the law unconstitutional, the court, on page 124, says:

> "The statutes of the different states and nations which have levied taxes on devises, legacies and inheritances have usually made exemptions, and these have sometimes related to the value of the estates, and sometimes to the value of the property received by the heirs, devisees, legatees or distributees. The exemption in the statute under consideration is certainly large as an exemption of estates, *but it is peculiarly within the discretion of the legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void.*"

In *U. S.* v. *Perkins*, *supra*, where a tax upon a legacy to the United States was sustained by this court as being, not a tax upon property, but a diminution from the legacy

before it became the property of the United States, the fact that New York state, by its statute, exempted certain portions from taxation was present to the mind of the court, and the court said:

> "We think that having regard to the purpose of the law to impose a tax generally upon inheritances, the legislature intended to allow an exemption only in favor of such corporations as it had itself created, and which might reasonably be supposed to be the special objects of its solicitude and bounty."

And in *California* v. *The Central Pacific R. R. Co.*, 127 U. S., 1, heretofore quoted, Mr. Justice BRADLEY, in giving the opinion of the court, speaking of the power to tax corporate franchises, said it was arbitrary in character, and added:

> "It has no limitation but the discretion of the taxing power. The value of the franchises is not measured like that of property, but may be ten thousand dollars or ten hundred thousand dollars, as the legislature may choose, or without valuation of franchise at all, the tax may be arbitrarily laid."

Mr. Thompson, in the fourth volume of his Commentaries on the Law of Corporations, Sec. 5557, treating of the tax upon franchises, says:

> "The question whether given taxes are to be regarded as taxes upon the property, or upon the franchises of corporations, has been often controverted. The importance of the question has lain in the fact that, under state constitutions requiring, in various forms of expression, all taxes to be equal, uniform, or proportional, the schemes of taxation which have been held valid on the ground of being taxes upon the franchises of corporations, and not upon their property, would admittedly have been held unconstitutional and void, if regarded as taxes upon their property merely. * * * *So, a statute laying a franchise tax is not subject to a constitutional provision requiring property to be assessed for taxes*

> *under general laws, and by uniform rules, according to its true valuation;* and in those states having constitutional provisions prohibiting the unequal taxation of property, it seems to be uniformly held that such provisions do not inhibit the legislature from laying indirect taxes upon franchises, privileges, trades and occupations."

And, in a recent case in New Jersey, the *Standard Underground Cable Co.* v. *Attorney General*, 46 N. J. Eq., 270, where the constitutionality of the tax was challenged as violating the provision of the constitution providing

> "That property shall be assessed for taxes under general laws and by uniform rules, and according to its true value,"

the court said:

> "The tax, payment of which is sought to be enforced by this proceeding, does not fall within that constitutional provision. The power of the legislature to impose taxes on persons, property, business, and franchises is unlimited, save only by such restrictions upon the exercise of that power as are found in the organic law, or such as are inherent in the nature of the subject. The fault of this position is the assumption that this tax is one upon property. Such, manifestly, is not the case. The law in question imposes a tax on certain corporations by way of a license for exercising corporate franchises. It is declared to be such tax by the act, and, although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a license or franchise tax. * * * Upon the power of the legislature to impose such a tax, there exists no restriction in our constitution. *As a license or franchise tax, it is not within the equality clause of the constitution referred to. In those states in the Union having constitutional provision requiring equality in the taxation of property, it is uniformly held that such provisions do not abridge or apply to to the legislative power of indirect taxation by taxes on franchises, privileges, trades and occupatio is.*"

> "It is peculiarly within the province of the legislature to declare what privileges shall be taxed and what exemptions may be allowed, in order to make taxes bear most lightly upon those least able to bear them"
>
> *State* v. *Alston*, 30 S. W. R., 750.

In Montana the law exempted estates of $7,500. in value. The Supreme Court held, after a careful review of the authorities, that exemptions were in the discretion of the legislature, and that the fact of such an exemption did not render the act void or make the tax unequal.

Gelsthorpe v. *Furnell*, 51, Pac. R., 267.

Cooley in his work on Taxation, page 392, says:

> "Where privileges are taxed, any occupation which is not open to all, but can only be exercised under license from some constituted authority is to be regarded as a privilege, and succession to inheritance may be taxed as a privilege, notwithstanding the property of the estate is taxed, and taxes on property are required by the constitution of the state to be uniform."

We, therefore, contend that the line between the power of the state in imposing a tax upon property and in imposing fees, excises or taxes upon franchises or privileges granted, is distinctly marked; that while the rule of uniformity and equality may be required as to the one, it does not control the legislature in dealing with the other. The power of the state to exempt the privilege or franchise to one class and exact the impost from another, is admitted save in two states, and the only rule of uniformity ever asserted as limiting legislative discretion, is, to apply, not between classes, but between members of the same class. The Supreme Court of Illinois is, therefore, in

perfect accord with all the leading authorities, in holding that the provision of the constitution of the state requiring that such revenues as may be needful shall be provided:

> "by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her or its property"

was not violated by the statute now under consideration, for the court stated in its opinion that:

> "a tax which affects the property within a specific class is uniform as to that class, and there is no provision of the constitution which precludes legislative action from assessing a tax on that particular class. * * * The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property inherited."

VII.

CASES RELIED ON BY APPELLANT.

Counsel cite four cases, which they say involved the question of progressive taxation, in the States of Minnesota, Wisconsin, Ohio and New Hampshire, and in which it is argued that laws similar in principle to the statute of Illinois were declared void, as in violation of the constitution of those states.

The case decided in Minnesota, *The State* v. *Gorman*, 40 Minn., 232, deals with the statutes of that state, which, in lieu of the fees, costs and perquisites theretofore allowed by law, as compensation for the services of judges of probate, and:

> "for the purpose of reimbursing the county

> treasurer for the salaries provided to be paid, in this act, the judge of probate, it shall be the duty of each executor, administrator or guardian to pay or cause to be paid to the county treasurer, for the use and benefit of the county in whose Probate Court proceedings are to be instituted, settle the estate of any deceased person * * * the following sums, according to the value of the estate and property of such deceased person."

The court held that the sums required to be paid into the county treasury "must be regarded as taxes in the ordinary sense of that word, and as it is used in the constitution."

Holding the exactions to be taxes in the general and precise meaning of the word, the court determined that there was a violation in apportioning the burden imposed, of the constitutional rule of equality, measured with reference to the value of the property taxed; and they say: "In the first place estates not exceeding $2,000 in value are wholly exempt from any contribution. If estates are taxable in this manner at all, such an exemption is contrary to the requirements of the constitution."

It is very plain that the law of Minnesota was not a succession or inheritance tax or impost or excise upon the right of transmitting or succeeding to property. It does not appear to have been suggested by any of the counsel in the case that the law could be treated as a tax inheritance law, and there is not the slightest allusion in the opinion to any such question, and it is apparent that no such question or principle was present to the mind of the court in deciding the case.

In the *State ex rel Sanderson* v. *Mann*, 76 Wis., 469, the court determined that the law imposed a tax upon the estate. In distinguishing the statute under consideration

from statutes imposing succession or inheritance taxes, the court said:

> "It is claimed that the exaction in question is nothing more than a succession tax, and as such constitutes a distinct class, and hence is not in violation of the rule of uniformity mentioned. Such a tax is essentially a tax upon the transmission of estates by devise, bequest or descent, and not, properly speaking, a tax upon the property constituting the estate before the same is thus transmitted. The view we have taken of this case renders it unnecessary to determine whether such a tax may lawfully be imposed, under our constitution. * * * Of course, the rights of heirs, devisees and legatees, in a certain sense, become vested at the death of such testate or intestate. * * * A succession tax would necessarily be imposed upon the respective parties thus succeeding to such residue. (*Commonwealth's Appeal*; 127 Pa. St., 438, and *Mason* v. *Sargent*, 104 U. S., 689.) But the tax in question is not upon such succession, but upon the whole estate at its appraised value, regardless of whether it is solvent or insolvent. * * * Manifestly the burden imposed, is not a succession tax, but a tax upon the whole estate, regardless of whether it is solvent or insolvent."

The court having thus plainly distinguished the statute which they were considering from a statute imposing a tax upon the succession or inheritance, determines that the tax cannot be sustained for the reason that it violates the rule of uniform taxation, required by the constitution, and also upon the ground that it is special legislation, applying only to Milwaukee County, and thus violates the provision of the constitution requiring tax laws to be general in their operation.

The court clearly understood the Minnesota case to deal with a statute similar in purpose and effect to that of Wisconsin.

They say: "We are pleased to note that two courts of high authority have each recently come to the same conclusion in respect to a similar enactment." Citing *State ex rel Davidson* v. *Gorman*, 40 Minn., 232, and *In Re Ruan Street*, 19 Atl. Rep., 219.

The cases decided in New Hampshire and in Ohio stand by themselves, and the determination of each case upon what the courts state to be peculiar provisions in the constitutions of both of these states. In each state the right to classify property or privileges and to designate one class as exempt from the tax or impost is denied, because forbidden by the constitution. The New Hampshire court concedes that in the absence of constitutional prohibition the legislature would have power to impose conditions by way of tax upon successions, but says that whether a tax on property or on a privilege the principle of equality must control.

The Ohio court says that by the exemptions of not to exceed $200. worth of personal property, a construction of the bill of rights is "evinced to the effect that in taxation of subjects other than property an exemption up to $200. in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all and the rate per cent. must be the same on all estates."

That leaves no discretion in the legislature either to exempt or to classify as between different classes of relatives. All persons, not all classes, are to be treated alike. The case, therefore, is in direct conflict with the doctrine of this court applying the Fourteenth Amendment to the subject of taxation.

In *Pacific Express Co.* v. *Seibert*, 142 U. S., 329, it is said:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms."

In *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S., 232, it is said:

"The provisions of the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all. * * * It may impose different specific taxes upon different trades and professions, and may vary, the rate of excise upon various products. * * *

We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation."

In the case of *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, it is said:

"Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course, the indirect result would be that all other property might have to pay a little larger rate per cent., in order to raise the revenue necessary for the carrying on of the state government; but this would not invalidate the tax on other property or give any right to challenge the law as obnoxious to the provisions of the Federal constitution."

Counsel for the plaintiffs in error have, in their briefs cited language from decisions of this court in various cases, which they contend is to be applied to and covers the contention involved in this case.

Such detached sentences from opinions, separated from their context and read without relation to the question which was before the court for consideration, may appear to sustain the argument they are quoted to support. The cases from which these excerpts are taken, wherever they bear even remotely on the question here involved, will be found to relate to *taxation of property*. Such cases neither in their discussion or determination deal with the rules which shall govern the legislature in imposing excises, imposts or other conditions on privileges granted by the state to corporations or natural persons. This is also true of the numerous cases from the different state courts cited by counsel. The greater number of the last named cases are devoted to the consideration of special assessments. We have no controversy with the rules announced in these various cases when applied, as they must be, to questions involving the taxation of the property of individuals or corporations. It is unnecessary for us to examine these respective cases in detail, or to burden this court with a discussion of them *seriatim*. They may be properly disposed of in this argument, and will be necessarily excluded from the attention of this court in determining the question here presented by invoking the rule stated by Chief Justice MARSHALL in *Cohens* v. *Virginia*, and quoted in the opinion of Mr. Chief Justice FULLER in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., on page 574:

> "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious.

The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

VIII.

POLICY OF PROGRESSIVE INHERITANCE TAXATION.

The distinguished counsel for the plaintiffs in error are not content with assailing the inheritance tax law of Illinois on constitutional grounds, and subjecting it in that regard to the ordinary judicial tests; they carry the discussion into what they term "the realm of practical statesmanship," and invite this court "in the service of politics" to a consideration of the arguments against progressive taxation found in the writings of various political economists, historians, and theoretical essayists. We are not disposed to follow counsel very far into what, if we were addressing our remarks to a legislative body, might prove an interesting and profitable field for investigation and discussion. The policy of a particular system of taxation is one to be determined by the legislative power and the wisdom or unwisdom of such determination all courts have constantly declined to discuss for the all-sufficient reason that such a question the courts have no authority to decide.

It is to be noted that with one exception the quotations made from these various writers in opposition to progressive taxation relate to progressive taxation upon *property*. Rene Stourm appears to be the only one who opposes inheritance taxes, and, according to counsel's in-

terpretation, he bases his objection to progressive inheritance taxes on the ground that such taxes "*involve an attack upon the natural right to dispose of property.*" As there is no such natural right, the conclusion of a writer founded on such a premise should carry but little weight.

It is admitted by counsel that many writers, and among others Mill, whose reputation as an economist will not suffer by comparison with any other, argue the propriety and justice of progressive inheritance taxes and contend that such taxes present different considerations from those pertaining to taxes upon property.

True, we have the statement of learned counsel that these writers fail to point out any sound distinction, but, as we have hereinbefore shown the difference between taxing property and taxing privilege, to have been recognized and asserted by this court as well as by a number of the State courts, and have, as we believe, shown the failure, perhaps the unwillingness of learned counsel to perceive such distinction, their criticism of the reasoning of the economists who are opposed to them may be ascribed to their enthusiasm as advocates rather than to their acumen as logicians.

Mr. Lecky, the writer who is quoted most extensively, and who is known as a historian, and not as an economist, and who wrote the work cited very much in the character of a partisan apologist for reactionary Toryism in Great Britan, states as one, if not his chief objection, that graduated taxation tends to discourage the accumulation of property. In that he is voicing the sentiment of the classes in Great Britain, and supporting the policy which more than anything else has tended to create class distinctions in that country, to wit: primogeniture;

which rule of descent has been discarded by all of our states, and repudiated by the national government, when in the ordinance of 1787 it declared that estates, of both resident and non-resident proprietors in the north-west territory, "dying intestate, shall descend to and be distributed among their children and the descendants of a deceased child in equal parts."

Mr. POMEROY, in his work on Municipal Law, after discussing primogeniture and the rule of descent in Great Britain, says, on page 473:

> "It will be seen that unless an estate is inherited by several female heirs who take equal shares, it cannot be subdivided, but must descend entire to a single heir. This rule of law has the effect to preserve land in the same families and to restrict its diffusion to an extent unknown and impossible in this country."

And, on page 475, he says:

> "The policy of our institutions is to preserve lands in commerce with a perfect freedom of acquisition and transfer, *and to prevent their accumulation in families*. This has been effected by admitting all relations in the same degree to inherit equal shares of an estate."

The accumulation of vast aggregations of capital, consisting principally of money or movables in the hands of individuals, is one of the marked tendencies in our country in these latter days, which has caused concern if not alarm in the minds of the most thoughtful and patriotic of our citizens. Such aggregations of enormous personal wealth in the hands of particular families and corporations have given, it is widely believed, to a portion of our population, comparatively small in numbers, an undue and dangerous influence upon the legislation of Congress as well as of the several states.

The operation of a progressive inheritance tax law is not, indeed, to prevent the accumulation of capital, but the tendency of its influence is to disperse or diffuse such capital among many persons by the testament of the decedent.

Dr. Max West, author of a work on Inheritance Tax, in an article in the Review of Reviews for February, 1893, remarks that "the tax has been found to be quite satisfactory in its practical operation and productive of very considerable revenues. It has not driven away capital, because men would rather pay their taxes after death than at any other time."

While it may be true that men will more willingly surrender the portions of their property that is due to the government when they can no longer make use of it, it is more than likely that the ruling passion of the accumulators of such large estates, to defeat the tax collector and evade their just proportion of taxation, will be strong in death, and if so, the direct influence of a progressive inheritance tax will be to induce the testator to distribute his estate among a larger number of his relatives, lineal and collateral, instead of leaving it in larger bulk to one or two.

In this view the natural operation of such a law is in accord with our American policy as to the diffusion of property and the breaking up of large estates, and is the very opposite of the policy which obtains in Great Britain.

This is no impugnment of men of wealth as a class, for it would be untrue to assert that they all look with disfavor upon laws which prevent property from escaping taxation. Mr. West, in the article above quoted from

says that Mr. Carnegie agrees with Edward Bellamy in approval of progressive inheritance taxes, and that both of them would like to see an inheritance tax rising as high as fifty per cent. in the case of multi-millionaires, and he quotes Mr. Carnegie as saying:

> "Of all forms of taxation this seems to be the wisest. Men who continue hoarding great sums all their lives, the proper use of which for public ends would work good to the community should be made to feel that the community in the form of the state cannot be deprived of its just share. By taxing estates heavily at death the state marks its condemnation of the selfish millionaire's unworthy life."

And in view of learned counsel's appeal to this court to consider this case from the standpoint of statesmanship and in the interest of politics we feel at liberty to cite here the statesmanlike utterance in favor of progressive inheritance tax laws of an eminent citizen, the the value of whose views of public policy is not lessened by the fact that he is an honored member of this court.

Dos Passos in a note to page 1 of his work on Collateral Inheritance Taxes, quotes from a letter of Mr. Justice BREWER, as follows:

> "I was not aware until such examination of the extent to which in this country the matter of taxation on successions has advanced. I have often urged the thought as one of the most just of taxes and if it were graduated in proportion to the amount of property passing I think it would be most beneficial. It would tend largely to prevent the accumulation of property in family line and to work that distribution which is for the interest of all."

Inheritance tax laws would subject to taxation a vast quantity of property that under usual conditions escape taxation.

The Hon. Mr. WINN, in an address made at Faneuil Hall, Boston, October 7, 1891, on the subject of "Taxation," quotes from a report of the Tax Committee of the Boston Executive Business Association the statement that the personal property of both city and state which under the law is subject to taxation cannot be less than twice the value of the real estate, and Mr. Winn states that

> "if this is so, more than two billions of dollars escapes taxation and the people are cheated of about $17,000,000 of taxes per annum. I understand that Mr. Robert Giffen estimates the wealth of England to be about one-sixth in land; applying this scale to Massachusetts, a sum not less than $1,700,000,000 escapes taxation, and the loss of taxes is $14,000,000 to $15,000,000."

We do not vouch for the correctness of the above statement; but it may be asserted without the fear of successful contradiction that the greater portion of aggregated personal wealth throughout the entire country escapes by one device or the other its due or proportionate share of the public burden.

It has been said that "there is nothing certain but death and taxes." Though death is certain, the payment of taxes on large classes of property is more "honored in the breach than in the observance." Inheritance tax laws make taxes as certain as death.

Progressive inheritance taxes are levied extensively not only in this country, but upon the continent of Europe. In the article by Dr. West already referred to, he states that the "duties on estates of deceased persons form one of the chief sources of revenue in Australasia. The rates are progressive in most of the colonies. In Victoria the maximum is ten per cent, applying to estates of more than £100,000. * * * In South Australasia the succession

duty is graduated from one to ten per cent. according to relationship alone." By the last act of Queensland, twenty per cent. is now taken of the large amounts bequeathed to persons not related to the testator. "Tasmania has a slightly progressive tax levied upon personalty alone." The death duties imposed by the English Parliament during the ascendency of Mr. Gladstone and the liberal party were progressive, there being an additional one per cent. tax on property amounting to £10,000. or more.

> The heaviest inheritance taxes on the continent are levied in Switzerland; in Geneva distant relatives pay fifteen per cent. In six cantons the rates are progressive. When there is no will the little Canton of Uri taxes distant relatives twenty per cent. and even more on the excess above 10,000 francs. The rates in Prussia are from one to eight per cent. The French law taxes the gross value of the property; the maximum rate is eleven and one-quarter per cent. Austria, Italy, Spain, Belgium, Holland, Denmark, Norway, Russia, Poland, Roumania and Monaco all have inheritance taxes."

In Ontario estates not exceeding $10,000. and legacies not exceeding $200. are exempt, and direct heirs are taxable only where the whole estate exceeds $100,000., and the rate is progressive. In Nova Scotia the exemption is $25.000. and the rate is progressive.

Progressive rates are also levied in Quebec and Manitoba.

Dos Passos, page 26.

So that when counsel denounce progressive inheritance taxes as unusual, arbitrary and socialistic, they arraign themselves in opposition not only to the theories of a large number of economists of learning and repute, and the action of American and British-American states, but

against the matured and settled practice of the most civilized and progressive nations of Europe.

As we have before indicated, we do not make these suggestions under any apprehension that this court, in the decision of this case, will be influenced by the opinion of political essayists or the practice of foreign nations. Taxation is a practical question and of the amount and necessity of a tax, as well as of the method by which it shall be obtained, the legislature is the conclusive judge.

Mr. Pomeroy in his work on "Municipal Law" quotes Chief Justice MARSHALL as follows, on page 389:

> "However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused, but the interest, wisdom and justice of the representative body and its relations with its constituents furnish the only security against unjust and excessive taxation, as well as against unwise legislation."

And, again:

> "The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislature and the influence of the constituents over their representatives to guard them against its abuse."

The policy, therefore, of this tax, is not a question to be determined by this court. We do not deny the authority of this court to test the validity of this legislation by the principles of the Federal constitution, and we have attempted to show, and hope we have succeeded in showing, that this statute is not obnoxious to any of the restrictions or limitations of that instrument. With reference to the

attempt of the counsel to impose on this court the determination of a question of policy, we quote the apt statement of Mr. Attorney General Olney, in *Pollock* v. *Farmers Loan & Trust Co.*

> "In its essence and in its last analysis it is nothing but a call upon the judicial department of the government to supplant the political in the exercise of the taxing power; to substitute its discretion for that of Congress in respect of the subjects of taxation, the plan of taxation, and all the distinctions and discriminations by which taxation is sought to be equitably adjusted to the resources and capacities of the different classes of society. Such an effort, however weightily supported, cannot, I am bound to believe, be successful. It is inevitably predestined to failure unless this court shall, for the first time in its history, overlook and overstep the bounds which separate the judicial from the legislative power—bounds, the scrupulous observance of which it has so often declared to be absolutely essential to the integrity of our constitutional system of government."

In conclusion we submit:

1. That the Illinois inheritance tax law imposes a tax upon the privilege of inheritance or succession and not upon property.

3. That the exemptions provided therein are fair and reasonable and within the discretion of the legislature to make.

3. That the classifications made by the statute were made in the proper exercise of legislative discretion, and that the rate charged is uniform upon all who take under the same circumstances or conditions. There is no discrimination in favor of one against another of the same class and, therefore,

4. The statute is not obnoxious to the Fourteenth

Amendment to the Constitution of the United States, as it denies to no person the equal protection of the law.

Respectfully submitted,

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APPENDIX.

The persons and amounts omitted from the operation of the inheritance tax laws in several of the states and the rate per cent. of tax in each.

New York.

Exempt: Father, mother, husband or wife, child, brother, sister, the wife or widow of a son or husband of a daughter, an adopted child or one to whom the deceased stood in the acknowledged relation of parent for at least ten years; any lineal descendant of the deceased, or any society or corporation, the property of which is exempt by law from taxation, and all estates not exceeding in value $500.

Rate: Estates passing to all others are taxed five per cent.

Pennsylvania.

Exempt: Father, mother, wife, children and lineal descendants born in lawful wedlock; wife or widow of a son.

Bequests to executors (of a fair and reasonable sum) in lieu of commission. Excess taxable.

Estates not exceeding $1,250.

Rate: $5 on each $100.

Maryland.

Exempt: The father, mother, husband, wife, children, and lineal descendants of the decedent.

Estates not exceeding $500.

Rate: Two and one-half per cent.

Virginia.

Exempt: Lineal descendants; father, mother, husband, wife, brother, sister, nephew or niece.

Rate:

West Virginia.

Exempt: Father, mother, wife, children, and lineal descendants of the grantor, devisor, or intestate; surviving husband.

Estates not exceeding $1,000.

Rate:

Delaware.

Exempt: Father, mother, wife, children, and lineal descendants of the decedent.

Estates not exceeding $500.

Rate:

Connecticut.

Exempt: Father mother, husband; lineal descendants; adopted child; lineal descendants of any adopted child; the wife or widow of a son: the husband of a daughter of decedent.

Bequests for some charitable purpose, or purposes strictly within the state.

Brothers and sisters of decedent.

Estate not exceeding $1,000.

Rate: Five per cent.

California.

Exempt: Father, mother, husband and wife, lawful issue, brother, sister, wife or widow of a son, or husband of a daughter, or adopted child or children, lineal descendants born in lawful wedlock.

Societies, corporations, and institutions now exempt by law from taxation.

Bequests to executors or trustees in lieu of commission.

Estates not exceeding $500.00.

Rate: $5 on every $100.

Maine.

Exempt: Father, mother, husband, wife, lineal descendants, adopted child, lineal descendent of adopted child; wife or widow of a son; husband or daughter.

Bequests to executors in lieu of allowances.

Educational, charitable, or benevolent institutions in the state.

Estate not exceeding $500.

Rate: Two and one-half per cent.

Massachusetts.

Exempt: Father, mother, husband, wife, lineal descendants, brother, sister, adopted child; lineal descendant of adopted child; wife or widow of a son; husband or a daughter of descedent.

Charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation.

Executors, compensation to.

Estates not exceeding $10,000; bequests not exceeding $500.

Rate: Five per cent.

New Jersey.

Exempt: Father, mother, husband, wife, children; brother or sister; lineal descendants born in lawful wedlock; wife or widow of a son; husband of a daughter.

Churches, hospitals, orphan asylums, public libraries, bible and tract societies, and all religious, benevolent and charitable institutions and organizations:

Estates not exceeding $500.00.

Rate: $5 on every $100.

The United States Succession Tax Law passed in 1862 was upon a graduated scale, and exempted property passing to a husband or wife, and also estates not exceeding $1,000 in value.

The classes and rate of taxation on all others were as follows:

Lineal issue or ancestor, brother or sister, 75 cents per $100 of value received.

Descendant of brother or sister of decedent, $1.50 per $100 of value received.

Brother or sister of father or mother, or lineal descendant of same, $3 per $100 of value received.

Brother or sister of grandfather or grandmother, and lineal descendants of same, $4 per $100 of value received.

All others, $5 per $100 of value received.